IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 03/03/2003

Coram

The Honourable Mr. Justice V.S. SIRPURKAR
and
The Honourable Mr. Justice F.M. IBRAHIM KALIFULLA

Criminal Appeal No.1606 of 2002
and C.A.Nos. 1607, 1639, 1640, 1779 and 1780 of 2002
and
Crl.M.P. No.11999 of 2002

Crl.A.No.1606 of 2002:

Paza Neduraman ..... Appellant

-Vs-

State, represented by
Deputy Superintendent of Police
Q Branch, CID, Chennai City
Chennai 5
(Central Crime Branch Cr.No.
298/2002) ..... Respondent

Crl.A.No.1607 of 2002:

Subha Veerapandian :: Appellant

:versus:

State, represented by
Deputy Superintendent of Police
Q Branch, CID, Chennai City
Chennai 5
(Central Crime Branch Cr.No.
298/2002) :: Respondent

Crl.A.No.1639 of 2002:

Pavanan :: Appellant

:versus:

State, represented by
Deputy Superintendent of Police
Q Branch, CID, Chennai City
Chennai 5
(Central Crime Branch Cr.No.
298/2002) :: Respondent

Crl.A.No.1640 of 2002:

Dr. A. Thayappan :: Appellant

:versus:

State, represented by
Deputy Superintendent of Police
Q Branch, CID, Chennai City
Chennai 5
(Central Crime Branch Cr.No.
298/2002) :: Respondent

Crl.A.No.1779 of 2002:

Paranthaman :: Appellant

:versus:

State, represented by
Assistant Commissioner of Police
Law & Order, Adyar Range
Chennai City :: Respondent

Crl.A.No.1780 of 2002:

Pavanan :: Appellant

:versus:

State, represented by
Deputy Superintendent of Police
Kobichettipalayam, Erode
(Kavundapadi P.S.
Cr.No.201/2002) :: Respondent

Appeals under Sec.34(4) of the Prevention of Terrorism Act, against the orders passed by the Special Court under the Prevention of Terrorism Act, Poonamalle, Chennai in Crl.M.P. Nos.10 to 12 and 16 to 18 of 2002

!For Appellants :: M/s. N. Natarajan
K. Chandru
Senior Counsel for
M/s. Yashodvardhan &
N. Chandrasekaran

^For Respondents :: Mr. Altaf Ahmed
Additional Solicitor
General of India for
Mr. P.N. Ramalingam and
Mr. S. Jayakumar, Addl.
Public Prosecutor

:JUDGMENT

V.S. SIRPURKAR, J.

This common order shall dispose of Criminal Appeal Nos.1606, 1607, 1639, 1640, 1779 and 1780 of 2002. All these appeals are against the orders passed by the Special Court under the Prevention of Terrorism Act, Poonamallee, Chennai. Vide all these orders, the bail applications filed by the appellants under Sec.49(7) of the Prevention of Terrorism Act, 2002 (in short "POTA") read with Sec.439 of the Code of Criminal Procedure, 1973 (in short "the Code") were rejected. All the appellants were arrested for having committed offences under Sec.21 of POTA. To be precise, accused Paza Nedumaran is said to have committed offences under Sec.21(1)(a), (2) and (3), punishable under Sec.2 1(4) of POTA as also under Sec.10 of the Unlawful Activities (Prevention) Act, 1967. So also, the other accused persons, viz. Suba Veerapandian, Pavanan and Dr. Thayappan are said to have committed under Sec.21(2) and (3), punishable under Sec.21(4) of POTA as also under Sec.10 of the Unlawful Activities (Prevention) Act, 1967. Accused Paranthaman is said to have committed the offence under Sec.21(1)(a) and 2 1(3), punishable under Sec.21(4) of POTA read with Sec.13(1) of the Unlawful Activities (Prevention) Act, 1967. The following table will show the Crime Numbers, concerned Police Station, Bail Petition Numbers as also the Criminal Appeal Numbers emanating from the orders passed on the bail applications:

Sl. No.	Name of the Accused	Crime No. & Police Station	Bail Petition No. before Spl. Court	Crl. Appeal No. before this Hon"ble Court	Remarks
(1)	P. Nedumaran (arrested on 1-8-2002)	Cr.No.298/2002 Central Crime Branch	Crl.M.P. No. 10 of 2002	Crl.Appeal No. 160 6 of 2002	

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(2) Suba Veerapandian -do- Crl.M.P. No. Crl.Appeal No.
(arrested on 11 of 2002 160 7 of 2002
16-8-2002)

(3) Pavanan (already -do- Crl.M.P. No. Crl.Appeal No.
under arrest) 12 of 2002 1639 of 2002

(4) Dr. Thayappan -do- Crl.M.P. No. Crl.Appeal No.
(arrested on 18 of 2002 1640 of 2002
3-10-2002)

(5) Paranthaman Cr.No.1417/2002 Crl.M.P. No. Crl. Appeal No.
(arrested on EF4 Abhiramapuram 16 of 2002 177 9 of 2002
18-9-2002) Police Station

(6) Pavanan (arrested Cr. No.201/2002 Crl.M.P. No. Crl.Appeal No.
on 3-7-2002) Kavunthampadi 17 of 2002 1780 of 2002
Police Station

All these appeals came to be filed in the second week of November, 20 02 and some in December, 2002. It is an admitted position that charge sheets were not filed against any of these accused persons when they had filed the bail applications or even when their bail applications were rejected by the Special Court as also when the present appeals were filed and admitted.

2. When these appeals were taken up for final hearing, learned Additional Solicitor General, Shri Altaf Ahamed, pointed out that the charge sheets were filed against all the accused persons in their respective cases excepting the accused Paranthaman. A statement was also made that the charge sheet against Paranthaman would also be filed shortly in the concerned court. In view of that, learned senior counsel appearing on behalf of the accused, viz. M/s. N. Natarajan and K. Chandru did not address us on the merits but confined themselves to a common point of law regarding the tenability of the bail applications made within one year of the arrest for the offences punishable under POTA as the Special Court has rejected all the bail applications on the common ground that bail cannot be granted to an accused within one year of his detention for the offences punishable under POTA. Learned counsel expressed that there is no authoritative pronouncements on this question and since the question had fallen for consideration directly in these appeals, it was necessary that the question is decided. Learned counsel also expressed an apprehension that if the second bail application is made again on the basis of the material found from the charge sheet, since the Special Court had rejected the earlier bail applications on the ground of limitations, it would be expedient to have a finding on the issue of limitation. Seeing all the orders under consideration, it is obvious that apart from the merits, all the bail applications have been rejected on the ground of interpretation of Sec.49(6) and (7) of POTA and a view has been taken that a bail application is not possible to be made or considered if it is made within one year of the detention.

3. It is the contention of the learned counsel for the appellants that the learned Special Judge has taken a completely erroneous view and has erred in rejecting the bail applications on the ground of limitation. They point out that it is not the import of subsections (6) and (7) of Sec.49 of POTA to prevent any bail application from being made or considered and/or the order being passed upon the bail application granting the bail. They also contend that a total embargo on the power of the court to grant bail within one year of the detention would virtually turn the arrest for the offences under POTA into a preventive detention. Learned counsel argued that the power to grant bail flows from Sec.437 of the Code and the plain reading of subsection (6) and proviso to subsection (7) of Sec.49 of POTA does not in any manner spell out an embargo on the power of the court to grant bail.

4. As against this, learned Additional Solicitor General, Shri Altaf Ahamed, contended that the Special court had correctly interpreted the provisions of subsections (6) and (7) of Sec.49 of POTA and had correctly held that there is a complete embargo on the power of the court to grant bail within one year. Learned counsel argued that even if this was a harsh provision, it was necessary in view of the seriousness of the crime committed by the accused persons. He further contended, relying on the decision in Kartar Singh v. State of Punjab (1 994) 3 SCC 569, that the Apex Court had saved a comparable provision under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short TADA) like Sec.20(7) and (8). Learned Additional Solicitor General, however, did not go at the question of constitutional validity raised by the learned counsel for the appellants in view of the fact that presently the constitutional validity of the provisions was not in question here since the Court was deciding only the appeals against the orders, refusing the bail. He also relied on the fact that it would not be for this Court to go into the question of constitutional validity of those provisions as the constitutional validity of the whole Act is pending before the Apex Court.

5. On these rival contentions, it is to be seen as to whether the language of Sec.49(6) and (7) of POTA spells out an absolute embargo on the power of the Special Court to grant bail within one year of the detention for the offences under that Act. The language of Sec.49 is as under:

49. Modified application of certain provisions of the Code-

... ...

(6) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless the Court gives the Public Prosecutor an opportunity of being heard.

(7) Where the Public Prosecutor opposes the application of the accused to release on bail, no person accused of an offence punishable under this Act or any rule made thereunder shall be released on bail until the Court is satisfied that there are grounds for believing that he is not guilty of committing such offence:

Provided that after the expiry of a period of one year from the date of detention of the accused for an offence under this Act, the provisions of subsection (6) of this section shall apply.

When we generally consider the whole section, the language of subsection (1) of Sec.49 suggests that every offence punishable under the Act would be cognizable offence within the meaning of clause (c) of Sec.2 of the Code and would be a cognizable case; subsection (2) suggests the applicability of Sec.167 of the Code with some modifications such as the addition of the proviso suggesting that if it was not possible to complete the investigation within the period of ninety days, the Special Court shall extend the period up to one hundred and eighty days on the basis of the report of the Public Prosecutor indicating the progress of the investigation as also the reasons for detention of the accused beyond the period of ninety days. The proviso further suggests that the Investigating Officer has to file an affidavit for seeking the police custody of the accused from judicial custody and would have to be state the reasons in support of his request. There is nothing suggesting an embargo on the powers of the court so far in subsections (1) to (5).

6. The language of subsection (6) of Sec.49 of POTA, however, only suggests that a person accused of an offence punishable under this Act (POTA) shall not be released on bail or on his own bond unless the Public Prosecutor is heard by the court. This subsection is also being read by the Prosecution as a repository of the power to grant bail because of the peculiar language thereof which presumes the existence of such a power. The only additional condition added by the subsection is the requirement of giving an opportunity to the Public Prosecutor before the order of release on bail or on bond is passed. Subsection (7), however, is a departure from the normal rule in the sense that it heightens the burden on the defence. The language suggests that where the Public Prosecutor opposes the bail application, such accused could not be released on bail until the court is satisfied that there are grounds for believing that he is innocent. The plain meaning would be that instead of showing that there is no prima facie case against him for his conviction, the accused would have to show that there is a prima facie case for his acquittal. Then comes the questioned proviso which suggests that after the expiry of one year from the date of detention of the accused, the provisions of subsection (6) of Sec.49 shall apply. We shall go to the other provisions later on but, at this juncture, it would be better to see the logic applied by the Special Court.

7. The Special Court seems to be suggesting that the proviso to subsection (7) of Sec.49 stipulates a period for considering the plea for bail order and has held that since that period is not over, the bail application are premature. Considering the orders together, there can be no doubt that the Special Court has also taken into consideration the other factors relevant for grant of bail holding that even under the ordinary law of bail, the accused persons were not entitled to be released. This is how the Special Court proceeds on the question (in the order against Paza Nedumaran): This court is conscious that the legislature can never be taken to have intended to give power to any authority to act in bad faith or power to abuse its powers the power, as conferred by subsections (6) to (8) of POTA 2002. Powers are conferred on public authority for achieving a public purposes or object of public interest. It is a power conferred upon a trust and not absolute.

In the circumstances, the learned Special Public Prosecutor's plea, questioning the very maintainability of bail application, while considering the specific bar to file bail application under section 49(6) and (7) of the POTA 2002, has a valid force.
Statutory period prescribed for the relief of bail from the date of initial remand is not yet matured as per the provisions of section 49 (7) proviso clause. Hence it is determined, the bail application of the petitioner is highly premature in point of time and thus destitute its merit in law.

It is, therefore, clear that reading the proviso to subsection (7), the court has presumed that the power to grant bail for these offences exists only via subsection (6) and the subsection (6) will be applicable only after the expiry of the period of one year from the date of detention of the accused for the offences under this Act. In our considered opinion, such interpretation is clearly erroneous.

8. In the first place, there is nothing in the language of subsection (6) or (7) and the proviso thereto to clearly suggest any bar for making an application for bail within one year of detention. There is also no embargo on the power of the court to consider such bail application and to grant bail. An interpretation of the provision of any Act must first depend upon the rule of litera legis, i.e. the actual language and the plain meaning thereof. It is only where the plain meaning is not possible because of the confusing language or ambiguous in the expression or because of such interpretation being contrary to some other provisions in the Act, the question of interpretation, more particularly the rule of harmonious construction would step in. In our opinion, there is nothing confusing or ambiguity in the language of subsections (6) and (7) as also the questioned proviso to subsection (7) of Sec.49 of POTA. The meaning is plain and simple. Subsection (6) undoubtedly acknowledges the existing power in the court to grant bail but suggests that the said power shall not be used unless an opportunity is afforded to the Public Prosecutor of being heard. All that subsection (6) suggests is the right of the Public Prosecutor of being heard before the bail is granted and the embargo on the power of the court to grant the bail even without hearing the Public Prosecutor. The language of subsection (7) is complementary to subsection (6). It suggests that where during such hearing the Public Prosecutor opposes the bail application of the accused then, it would have to be shown to the court and the court would have to be satisfied that there exists some material or ground suggesting that the accused is not guilty of committing such offence. Plainly speaking, it would be for the defence to plead and prove to the satisfaction of the court a prima facie case for acquittal.

9. All that is suggested by the proviso is that after the expiry of the period of one year from the date of detention of the accused for the offences punishable under this Act, the provisions of subsection (6) would apply thereby implicitly excluding the rigour of subsection (7) and as such, there would be no need for the accused to establish that he is prima facie not guilty or that there are grounds for believing that he is not guilty. In our

opinion, beyond this the language of the proviso cannot be stretched further to hold that the court is absolutely powerless to grant bail within one year of the detention of the accused. Such interpretation is neither warranted from the language of the proviso nor is in keeping with the general principles of bail and the powers of the court to grant the same. In our opinion, if the accused completes one year and thereafter the bail application is filed, the court would still be required to hear the Public Prosecutor before granting bail and could not grant bail unless the Public Prosecutor is given an opportunity of being hear and because of the language of the proviso, the court would have the power to grant bail on the basis of its presumed power under subsection (6). The error committed by the Special Court is that it considers subsection (6) to be the sole repository of the power to grant bail. We clarify that the repository of the power to grant bail is Sec.437 of the Code. POTA, of course, provides the modified application of certain provisions of the Code.

10. When we read subsections (6) and (7) of Sec.49 of POTA conjointly, it is clear therefrom that if the bail application is made and is not resisted by the Public Prosecutor, who is heard before passing the order, then, there is nothing to suggest that the court still does not have a power to grant bail. In our opinion, subsection (7) will spring up only where the Public Prosecutor is heard under subsection (6) but opposes the bail application. It is on account of this opposition that the accused may have to establish a prima facie case in favour of his acquittal than to meet a challenge posed by the prosecution of there being a prima facie case for his conviction. If we read an absolute bar in the proviso then even where the Public Prosecutor does not oppose the bail plea, the court would be divested of its power to grant the bail. Such can never be and is not the import of the language of the questioned proviso. It merely reduces the rigour of subsection (7) in the eventuality of the expiry of the period of detention for the offences under POTA. The placement of the proviso is extremely important. It qualifies subsection (7) alone so as to reduce the burden of defence to prove a prima facie case for acquittal.

11. We cannot accept the contention of the learned Additional Solicitor General that there is an absolute bar spelt out in proviso to subsection (7) of Sec.49 of POTA for one more reason. If the power is absolute as is being suggested then, even where a charge sheet is not filed within one hundred and eighty days, the accused would have no right to apply for bail and the court would not have any right to grant the same. It has already been held in the various pronouncements of the Apex Court that the right springing out from the non-filing of the charge sheet within the specific period provided under Sec.167 of the Code is an absolute right and such right has been described as □indefeasible right□. When a very specific question was put to the learned counsel for the prosecution, he suggested that in that case, the bail would be on account of the default of the prosecution. We fail to understand as to how that bail would be in any manner different from the ordinary bail. Proviso (a) to subsection (2) of Sec.167 of the Code itself suggests as under:

□167. Procedure when investigation cannot be completed in twentyfour hours.-

... ...
and, on the expiry of the said period of ninety days, or ninety days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be to released under the provisions of Chapter XXXIII for the purposes of that Chapter;
...
Therefore, even if the accused gets an indefeasible right for bail, all the same the said bail order is only in the nature of a bail granted under Chapter XXXIII of the Code for which a regular application would have to be made by the accused person suggesting that he is prepared to furnish and does furnish bail bond. That preparation has also been read by the Apex Court as an essentiality for application of Sec.167 of the Code. Therefore, the attempt on the part of the learned Additional Solicitor General to treat the two kinds of bails separately is clearly unwarranted.

12. A parallel was tried to be drawn by the learned Additional Solicitor General with Sec.20(8) of TADA, perhaps, as a criticism levelled by the learned counsel for the defence to the draconian nature of the fetters on the powers of the court to grant bail. It was tried to be suggested that the Supreme Court quenched the onslaught against Sec.20(8) of TADA and upheld its validity. The tone of the argument was that even if the proviso is interpreted as creating an absolute bar on the power of the court to grant bail within one year of detention, it would be of a little consequence because the Apex Court had upheld the validity of Sec.20(8) of TADA, which was more or the less comparable in its rigour to the present proviso to subsection (7) of Sec.49 of POTA. For this purpose, heavy r eliance was placed on the reported decision in (1994) 3 SCC 569 (Kartar Singh v. State of Punjab) and more particularly the discussions in paragraphs 341 to 357. In the first place, there is a specific difference in the language of subsections (6) and (7) and the proviso thereto of Sec.49 of POTA on the one hand and Sec.20(8) of TADA on the other. Sec.20(8) of TADA reads as under:
20. Modified application of certain provisions of the Code.-
... ...
(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless
(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
The difference is apparent. In the language of clause (b) of subsection (8) of Sec.20 of TADA it is innate that where the Public Prosecutor opposes the bail, there had to be a satisfaction on two factors, viz.
1.That there are reasonable grounds for believing that the accused was not guilty of such offence; and
2.that he was not likely to commit any offence while on bail.
The proviso which figures to subsection (7) of Sec.49 of POTA does not figure in Sec.20(8) of TADA. The two provisions, in our opinion, are not comparable

with each other excepting for the similarity regarding the fetters created on the court's power not to grant bail without hearing the Public Prosecutor and where the Public Prosecutor opposes the bail plea, the further requirement of there being prima facie grounds to believe that the accused had not committed the offence. The aspect of the length of the detention is totally absent in Sec.20(8) TADA and we have already explained that the proviso has been introduced not with the idea of creating an absolute bar for the grant of bail within one year but with the positive idea of lessening the rigour of subsection (7) of Sec.49 of POTA where the detention period exceeds one year. The legislature could have straight away created a bar for the grant of bail if that was the legislative intent. We cannot read something by stretching the obvious language of the proviso when such a bar could have been created in a simple clause. The learned Additional Solicitor General was candid enough to say that this could be a bad-draftsmanship. We do not, however, subscribe to that view. In our opinion, as has already been explained, the plain meaning of the proviso is to lessen the rigour of subsection (7) in the event the detention exceeds one year period.

13. Learned senior counsel, M/s. N. Natarajan and K. Chandru drew our attention to the Parliamentary debates and more particularly the address of the Hon'ble Home Minister, who piloted the said Bill. Following excerpt from the speech of the Hon'ble Home Minister was relied upon by Mr. K. Chandru:

'A question was asked by Shri Somnath Chatterjee about bail. POTO will become an Act only if we pass it and the other House also passes it. At present it is an ordinance and is so since October. Hon'ble Minister was right that in the last 5-6 months action under POTO have been started against 86 persons in Jammu and Kashmir and out of those only 10 were given bail. I am mentioning it to remind you that there was no provision of bail under TADA. Shri Jaipal Reddy said that POTO provides for no bail during the first year in spite of its stringent provisions and after one year, normal law would prevail. It is not that bails are impossible in the first year. That's why I mentioned that out of 86 persons booked under POTO in Jammu and Kashmir, 10 have got bail.'

Learned senior counsel contended that the Parliamentary debates and more particularly the speech of the mover of that particular Act can be looked into while interpreting any particular provision. Reliance was placed on the decision in P.V. Narasimha Rao v. State, reported in AIR 1998 SC 2120 and more particularly on paragraph 77 thereof. Reading that paragraph, it is clear that the statement of the Hon'ble Minister, who had moved the Bill in the Parliament, can be used to ascertain the mischief sought to be remedied by the legislation and the object and the purpose for which the legislation is enacted. In that paragraph, a reference was made to the decision in Pepper v. Hart (1 993 1 All E.R. 42) wherein it was held that a reference to the statement of Minister or other promoter of the Bill could be made as an aid to construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity provided the statement relied upon clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words and that such a statement of the Minister must be clear and unambiguous. Another reference was made by the learned counsel to the decision in T.N. LAKSHMAIAH v. STATE OF KARNATAKA (2002 (1) SCC 219) and more particularly to para 7 thereof where the Apex

Court has referred to the speech of Lord Macaulay while introducing the Indian Penal Code for highlighting the idea with which Sec.84 IPC was introduced. Apart from the fact that the statements of the Hon□ble Home Minister is clear enough to dispel any misgivings about the meaning of the proviso to subsec.(7), we are of the clear opinion that in reality it is not necessary to go to the statement of the Hon□ble Home Minister because the meaning of that proviso is clear and the proviso does not really create any absolute embargo on the powers of the court as contended by the prosecution.

14. Learned senior counsel for the accused tried to suggest that the inclusion of this organisation in the schedule was itself erroneous and unconstitutional. We were also addressed on the question of Sec.18 of POTA which provision provides for declaration of an organisation as a terrorist organisation. It was suggested that an organisation becomes a terrorist organisation if under Sec.18(1)(a) it is listed in the schedule. It was pointed out that thereby a particular organisation, which was a part of the schedule, becomes a terrorist organisation by the executive act and not by the legislative act. It is not our domain to decide this question since admittedly the whole Act is lying before the Apex Court for testing its constitutional validity. Learned counsel, however, tried to suggest haltingly that while deciding the correctness of the order refusing the bail, we can consider this argument also. We do not agree. The appeals have been filed under the provisions of Sec.34 of POTA and, therefore, in the strict sense, we are not seized of the question of constitutionality of any of the provisions of POTA. Though, it is by a legislative act that this particular organisation has been included in the schedule, which schedule is also a part and parcel of the Act, we would refrain from expressing any opinion on this issue. This is apart from the fact that a challenge is pending to the declaration of this organisation being a unlawful organisation.

15. There were contentions raised on the facts before the Special Court. The Special Court has also adverted in its order to the general law of bail and has also considered the various factual contentions raised. However, learned counsel appearing on behalf of the appellants very fairly contended that we need not go into the factual aspect for the grant of bail. In view of the fact that now the charge sheets were filed in case of all the accused persons except one and that the charge sheet was also going to be filed shortly against the remaining accused, learned counsel, therefore, contended that they would raise all the questions based on the factual aspects in the fresh applications which they intend to make. In that view, we need not go into the merits aspect or the factual aspect on which the Special Court has delved upon. Needless to mention that in the event fresh bail applications are filed on the basis of the charge sheets supplied, all the questions would be open to the accused persons □ factual as well as legal.

16. In the view we have taken, we would choose to dispose of all the appeals in the light of the observations made above. Connected Crl.M.P. is closed.

Index:Yes
Website:Yes

Jai

To:

1. Deputy Superintendent of Police
Q Branch, CID, Chennai City
Chennai 5

2. Assistant Commissioner of Police
Law & Order, Adyar Range
Chennai City

3. Deputy Superintendent of Police
Kobichettipalayam, Erode
Kavundapadi Police Station